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(2) Even if racial exclusions in the form of quota, percentage or balance requirements could be said to be constitutionally permissible or required, existing lop-sided enforcement against children, parents, teachers and school districts in Southern States only, constitutes invidious sectional discrimination which in and of itself is violative of rights secured to such persons under the various "due process" and "equal protection" guarantees of the United States Constitution..... 46

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IN THE

Supreme Court of the United States

October Term, 1970

No. 420

CHARLES McDANIEL, et al.,

Petitioners,

-vs-

JOSEPH BARRESI, JR., et al.,

Respondents.

BRIEF OF THE STATE OF GEORGIA AS AMICUS CURIAE

INTEREST OF THE STATE OF GEORGIA

The State of Georgia has many and varied interests in the mental and physical development of its children, not the least of which is that they become productive members of our multiracial, culturally variegated society. The cynic may doubt the truth of this assertion. The concerned and knowledgeable observer will not. The importance to the State of Georgia of a continually improving rather than deteriorating program of public education would seem self-evident. As we will show, the State's ability to achieve this goal is in jeopardy.

QUESTIONS PRESENTED

1. Are attempts of the federal government to impose racial exclusions (i.e., quota, percentage or balance requirements) upon pupils and teachers in Georgia's public schools authorized by the Constitution and laws of the United States?

2. Assuming *arguendo* that the answer to question one is in the affirmative, are attempts to coerce racially motivated exclusions nonetheless prohibited to the government in that they violate transcendental countervailing rights, privileges and immunities which the Constitution and laws of the United States secure to the children, parents, teachers and public school districts of Georgia as well as to the State itself?

3. Assuming *arguendo* that the federal government is authorized by law to impose racial exclusions upon pupils and teachers in the public schools, may it engage in invidious sectional or geographic discrimination in its exercise of this power—coercing only those children, parents and teachers who happen to reside in the Southern States?

STATEMENT

(1) *Nature of the Case.*

Presented for decision is a case involving a local board of education in Georgia which in response to the funds termination power of the United States Department of Health, Education and Welfare adopted racial ratios of black 20% to 40% and white 80% to 60% in all but two of the elementary schools within its jurisdiction. This goal was to be attained by the exclusion of both black and white pupils from the schools nearest their homes or of their choice, solely on the basis of their race

or color, and by assigning these pupils, again solely because of their race or color, to more distant schools—not of their choice. In the two excepted schools, the balance sought was 50% black and 50% white. It appears that these exceptions were made in response to the desire of citizens within the black community to maintain some degree of racial identity in the two schools.

The plaintiffs below (here respondents) are both black and white parents and children. Objecting to being excluded solely for racial reasons from the schools they desire to attend, they filed suit to enjoin implementation of the local school board's plan. Although it is not, in our view of the case, material to the issues presented, we note that each of the pupils either walks or is bused to his (or her) school, depending upon its distance from his (or her) place of abode. The Supreme Court of Georgia held that the racial exclusions were contrary to this Court's ruling in *Alexander v. Holmes County Board of Education,* 396 U.S. 19 (1969), that "no person is to be effectively excluded from any school because of race or color". See *Barresi v. Brown, President of the Clarke County Board of Education, et al.,* 226 Ga. 456, ... S.E.2d ..... (1970). As we will show, the Supreme Court of Georgia was correct.

(2) *Statement of Facts.*

The precise "holding" of *Brown v. Board of Education*[1] was that State-enforced exclusion of black children from a public school pursuant to State laws either "requiring or permitting" segregation by race violated rights secured to such children by the Fourteenth Amendment to the Constitution. In the context of its express prohibition

[1]347 U.S. 483 (1954).

of *State-enforced* racial separation or segregation, there is no doubt but that implementation of the decision has been an unqualified success in those States generically described as "the South". Despite strong emotional as well as intellectual opposition to *Brown*, the overwhelming majority of Southern school officials have long since come to accept the fact that State-enforced racial separation is dead. These officials recognize that black children have a personal, present and unqualified constitutional right to be neither excluded from a particular school because of their race nor required to attend a particular school because of their race.

In Georgia, as in other Southern states, most school districts sought to implement the newly defined "personal right" through adoption of "freedom of choice" plans. In essence, these plans gave each child's parents the right to choose the school their child would attend. While this quite predictably resulted in most students electing to attend schools in which their own particular race was in the majority, it was generally thought that this normal ethnocentric phenomenon was in no way inconsistent with *Brown*. The existence of a truly free choice as to school assignment was *ipso facto* considered to negate the presence of State enforcement respecting the assignment. See e.g., *Bradley v. School Board of the City of Richmond, Virginia*, 345 F.2d 310, 313, 316-17 (4th Cir. 1965); *Briggs v. Elliott*, 132 F.Supp. 776 (E.D.S.C. 1955). [3 judge]. Under this concept of *Brown*, it is a *personal* right which the Fourteenth Amendment protects. This view is thoroughly consistent, of course, with the repeated declarations of this Court that it is "the individual" who is entitled to equal protection of the laws. E.g., *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 351 (1938);

Sweatt v. Painter, 339 U.S. 629, 635 (1950). As stated in *McLaurin v. Oklahoma State Regents,* 339 U.S. 637, 641 (1950):

> "State-imposed restrictions which produce such inequalities cannot be sustained.
>
> It may be argued that appellant will be in no better position when these restrictions are removed, for he may still be set apart by his fellow students. This we think is irrelevant. *There is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar.*" (Italics added)

But another view of *Brown* arose. This second view was one which construed the underlying philosophy of that decision not as the vindication of a personal right of black students not to be subjected by the State to racial segregation, but as a broad policy attack against the very fact of racial separation, whether resulting from personal choice, State compulsion or otherwise.[2] It is this view of *Brown* which the federal government has so diligently sought to implement in Georgia and the various other Southern States—while ignoring the fact of racial separation elsewhere. For the South and the South alone, the effort has been one of achieving racial quotas or balance. If in fact and law this second view is the ultimate mandate of *Brown,* it can only be said that while federal officials may have achieved a certain degree of educa-

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[2]The particular alchemy by which the former personal constitutional "right" is converted into a personal constitutional "duty" under the Fourteenth Amendment has never been explained.

tional disaster in the South, implementation has been an abysmal failure nationally.[3]

The scope of the national failure to achieve, approach or even hold even with this second (and we think debased) view of *Brown* is well described by the government's own statistical releases. While the level of racial integration in the public schools of Georgia and the other Southern States has been forced upwards, the national trend has for the most part been in exactly the opposite direction, *i.e.*, towards increased racial separation. The most recent statistical information released by the United States Department of Health, Education and Welfare (January 4, 1970) shows that by the Fall of 1968, the *national* level of racial separation in the public schools had risen to the point where only 23.4 percent of black pupils enrolled in the Nation's public schools were attending schools with a predominantly white enrollment, and further shows that fully 61% of the country's black pupils were enrolled in almost totally (95 to 100 percent) black schools.[4]

Nor can this Nation-wide trend be said to be "newly discovered". Discussing the great increase in racial segregation in the public schools of 15 selected Northern cities[5] between 1960 and 1965, the 1967 report of the

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[3]The totality of the failure has been increasingly recognized by writers, both black and white, who have long been associated with the furtherance of Civil Rights. See e.g., Stewart Alsop, "The Tragic Failure", Newsweek, Feb. 23, 1970; William Raspberry, "Concentration on Integration is Doing Little for Education", The Washington Post, Friday, Feb. 20, 1970.

[4]See U. S. Department of Health, Education and Welfare "HEW NEWS", Jan. 4, 1970.

[5]Cincinnati; Milwaukee; Pasadena; Philadelphia; Pittsburgh; In-

United States Commission on Civil Rights entitled "Racial Isolation in the Public Schools" noted at p. 8:

> "Eighty-four percent of the total Negro increase in these 15 city school systems was absorbed in schools that are now 90-100 percent Negro, and 94 percent in schools more than 50 percent Negro. In Cincinnati, Ohio, the Negro elementary school enrollment doubled over the last 15 years, but the number of Negro children in majority-Negro schools almost tripled. In 1950, 7 of every 10 Negro elementary school children in Cincinnati attended majority-Negro schools. In 1965, nearly 9 of 10 did. In Oakland, Calif., almost half of the Negro elementary school children were in 90-100 percent Negro schools in 1965. Five years earlier, less than 10 percent were. During the 5-year period, Negro elementary school enrollment increased by 4,100 but the number of Negro students in 90-100 percent Negro schools increased by almost 8,000."

The exact increases in percentages of black pupils attending almost all (90 to 100 percent) black schools and

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dianapolis; Cleveland; Oakland; Detroit; Buffalo; San Francisco; Chester; Harrisburg; Springfield, Massachusetts; and New Haven.

predominantly black schools in the specified Northern cities were set forth by the Report as follows:

City	Year	90-100% Negro Enrollment	Majority-Negro Enrollment	Year	90-100% Negro Enrollment	Majority-Negro Enrollment
Cincinnati	1950	43.7	70.7	1965	49.4	88.0
Milwaukee	1950	51.2	66.8	1965	72.4	86.8
Pasadena	1950	0.0	26.2	1965	0.0	71.4
Philadelphia	1950	63.2	84.8	1965	72.0	90.2
Pittsburgh	1950	30.4	51.0	1965	49.5	82.8
Indianapolis	1951	83.2	88.2	1965	70.5	84.2
Cleveland	1952	57.4	84.4	1962	82.3	94.6
Oakland	1959	7.7	71.1	1965	48.7	83.2
Detroit	1960	66.9	91.1	1965	72.3	91.5
Buffalo	1961	80.5	89.4	1965	77.0	88.7
San Francisco	1962	11.6	75.8	1965	21.1	72.3
Chester	1963	71.1	85.8	1965	77.9	89.1
Harrisburg	1963	58.1	82.7	1965	54.0	81.3
Springfield, Mass.	1963	0.0	58.8	1965	15.4	71.9
New Haven	1963	22.5	71.0	1965	36.8	73.4

As for the other side of the racial polarization, the Report showed that the bulk of the white pupils were being permitted to attend virtually all (90 to 100 percent) white schools. It showed the following percentages respecting enrollment of the white pupils in 90 to 100 percent white schools:

Cincinnati	63.0%	Detroit	65.0%
Milwaukee	86.3%	Buffalo	81.1%
Pasadena	82.1%	San Francisco	65.1%
Philadelphia	57.7%	Chester	37.9%
Pittsburgh	62.3%	Harrisburg	56.2%
Indianapolis	80.7%	Springfield, Mass.	82.8%
Cleveland	80.2%	New Haven	47.1%
Oakland	50.2%		

The pattern of increasing racial separation, isolation

or segregation within these particular Northern cities was found by the United States Commission on Civil Rights to be typical of Northern school districts. The Report pointed out that by the 1965-66 school year fully 89.2 percent of Chicago's black students were attending virtually all (90 to 100 percent) black schools while at the same time 88.8 percent of the city's white pupils were being permitted to attend virtually all (90 to 100 percent) white schools. Statistics for some of the other Northern cities, as set forth at pp. 4-5 of the Commission's report, showed the following situation by 1965:

City	% of Negro Pupils in 90-100% Negro Schools	% of Negro Pupils Majority Negro Schools	% of White Pupils in 90-100% White Schools
Richmond, Calif.	32.9	82.9	90.2
San Diego, Calif.	13.9	73.3	88.7
Denver, Colo.	29.4	75.2	95.5
Hartford, Conn.	9.4	73.8	66.2
New Haven, Conn.	36.8	73.4	47.1
East St. Louis, Ill.	80.4	92.4	68.6
Fort Wayne, Ind.	60.8	82.9	87.7
Gary, Ind.	89.9	94.8	75.9
Wichita, Kans.	63.5	89.1	94.8
Baltimore, Md.	84.2	92.3	83.8
Boston, Mass.	35.4	79.5	76.5
Flint, Mich.	67.9	85.9	80.0
Minneapolis, Minn.	None	39.2	84.9
Kansas City, Mo.	69.1	85.5	65.2
St. Louis, Mo.	90.9	85.5	65.2
Omaha, Neb.	47.7	81.1	89.0
Newark, N. J.	51.3	90.3	37.1
Camden, N. J.	37.0	90.4	62.4
Albany, N. Y.	None	74.0	66.5
New York, N. Y.	20.7	55.5	56.8
Columbus, Ohio	34.3	80.8	77.0
Tulsa, Okla.	90.7	98.7	98.8

City (Cont'd.)	% of Negro Pupils in 90-100% Negro Schools (Cont'd.)	% of Negro Pupils Majority Negro Schools (Cont'd.)	% of White Pupils in 90-100% White Schools (Cont'd.)
Portland, Ore.	46.5	59.2	92.0
Providence, R. I.	14.6	55.5	63.3
Seattle, Wash.	9.9	60.4	89.8
Washington, D. C.	90.4	99.3	34.3

The Report concluded at p. 6:

> "Nor does the pattern necessarily vary according to the proportion of Negroes enrolled in the school system. For example, Negroes are 26 percent of the elementary school enrollment in Milwaukee, Wis., and almost 60 percent of the enrollment in Philadelphia, Pa., yet in both cities almost three of every four Negro children attend nearly all-Negro schools. Negroes are 19 percent of the elementary school enrollment in Omaha, Nebr., and almost 70 percent of the enrollment in Chester, Pa., yet in both cities at least 80 percent of the Negro children are enrolled in majority-Negro schools."

Noting that during the time covered by its study (i.e., primarily before 1966 and the start of federal officialdom's intensive efforts to impose racial quota and racial balance requirements upon *Southern* school districts) the level of racial separation was only slightly higher in the South, the Commission concluded at p. 7 of its Report:

> "The extent of racial isolation in Northern school systems does not differ markedly from that in the South."

Due to the lop-sided efforts of the Justice Department and HEW, the Commission's conclusion of substantial similarity between Northern and Southern school systems has become wholly inaccurate. While the general dearth of black pupils in many Northern systems may tend to give misleading statewide figures, examination of rec-

ords of the federal government respecting those Northern school systems which do have any appreciable number of black students clearly demonstrates that these systems have far higher levels of racial separation, isolation and segregation than federal officials have ever been willing to tolerate in Georgia and other States in the South.

Intensification of the disparity of treatment between Northern and Southern school systems respecting racial quota and racial balance requirements began at least as early as 1966. In that year, HEW, apparently unhappy over the way in which black parents and pupils in the South were exercising their "freedom of choice", decided to limit the use of such plans. It decided that henceforth these plans would be acceptable only if the choices were exercised in the way in which HEW officials thought they should be exercised. The March 1966 "Guidelines for School Desegregation" commenced HEW's march towards racial quota or balance requirements as a requisite for continued federal financial assistance. The guidelines announced:

> "The single most substantial indication as to whether a free choice plan is actually working to eliminate the dual school structure is the extent to which Negro or other minority group students have in fact transferred from segregated schools. . . . Where a free choice plan results in little or no actual desegregation, or where, having already produced some degree of desegregation, it does not result in substantial progress, there is reason to believe that the plan is not operating effectively and may not be an appropriate or acceptable method of meeting constitutional or statutory requirements."[6]

[6]See U. S. Department of HEW, "Revised Statement of Policies for School Desegregation Plans Under Title VI of the Civil Rights Act of 1964", (March 1966).

HEW indicated that it would be satisfied with the "progress" of local school systems only if:

(1) school districts which had at least 8 or 9 percent of their pupils transfer under such a plan during the 1965-66 school year at least doubled the percentage during the 1966-67 school year,

(2) school districts which had only 4 or 5 percent of their pupils transfer under such plans during the 1965-66 school year at least tripled the percentage during the 1966-67 school year, and

(3) school districts having a lower percentage of transfers achieved a proportionately greater rate of increase for the 1966-67 school year.[7]

The "guidelines" went on to say that if a "freedom of choice" plan did not produce results satisfactory to HEW (i.e., sufficient racial balance) it might "require the school system to adopt a different type of desegregation plan". The racial quota requirements of the March 1966 guidelines were continued in the December 1966 guidelines for the 1967-68 school year.[8]

In March 1968, the United States Department of Health, Education and Welfare published its "Policies on Elementary and Secondary School Compliance with Title VI of the Civil Rights Act of 1964". There HEW announced that in order to continue to receive federal financial assistance, school districts (meaning, of course,

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[7]Ibid.

[8]U. S. Dept. of HEW, "Revised Statement of Policies for School Desegregation Plans Under Title VI of the Civil Rights Act of 1964", (Dec. 1966, as amended for the School Year 1967-68).

Southern school districts only) would have to "bring about an integrated unitary school system . . . so that there are no Negro or other minority group schools and no white schools. . . ." The deadline was the 1968-69 school year or, at the latest, the 1969-70 school year. Nor was there any doubt as to the fact that under the lexicon of HEW "integrated unitary school system" *meant* racial balance or at least a reasonable likeness thereof. According to HEW, Southern school systems were to be expected to go beyond freedom of choice and to accept the pairing of schools, closing of schools, reassignment of pupils, and the redrafting of geographic attendance zones to maximize affirmative integration (or, in other words, racial balance).

While HEW was in this manner compelling local school systems in Georgia and other Southern States to accept racial quotas and balance requirements as a condition of continued federal financial assistance, the Department of Justice occupied itself by seeking judicial sanction for its "special treatment" for Southern school systems and pupils. Between enactment of the Civil Rights Act of 1964 and January 1, 1970, the Justice Department initiated or otherwise participated in almost 200 legal actions to compel integration in at least 400 local school districts within the 11 States of the South.[9] Twenty-six of these suits (involving approximately 107 local school systems) were filed within the State of Geor-

[9]Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas and Virginia. Two of the suits were filed on a statewide basis. One, in Alabama, affected 100 local school districts while the other, against the State of Georgia, affected 81 local school districts. Other cases similarly have involved a multiplicity of school district defendants.

gia alone. In all of the remaining 39 States of the Union, the Department of Justice has seen fit (as of January 1, 1970) to file or otherwise participate in actions against only 8 local school districts.[10]

The Justice Department's initial success in converting the personal constitutional *right* of a pupil not to be excluded from a school or required to attend a school solely because of his race into a *duty* to accept exclusion or assignment for precisely this reason (i.e., his race) was achieved in *United States v. Jefferson County Board of Education,* 380 F.2d 385 (5th Cir. 1967) [en banc]. There, for the first time, the Justice Department persuaded a majority of the Court of Appeals for the Fifth Circuit, at least insofar as Southern schools and pupils were concerned, to abandon the concept of *Brown* as a protection of personal rights of the governed from governmental interference. The new rule was one of Federal power and individual duty. A majority of the Court of Appeals for this Circuit even went so far as to deny that freedom of individual choice was a valid constitutional goal! By dicta, it approved the percentage guidelines or racial quotas established by HEW. As the dissenting opinions so correctly foresaw and so forcefully pointed out, *Jefferson's* disclaimer of any "racial balance" requirement was naught but window dressing. The untimely (although we hope temporary) end at the hands of *Jefferson* of those personal rights and freedoms born of *Brown* is now a matter of public record and common knowledge. Within two years after *Jefferson,* the Fifth Circuit was saying:

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[10]"Defendants' Answers to Certain of the Mitchell Interrogatories", filed in *Georgia, et al. v. Mitchell, et al.,* Civil Action No. 265-70 (D.D.C.), appeal pending, U.S. Court of Appeals for the District of Columbia Circuit, No. 24423.

> ". . . we are firm that a point has been reached in the process of school desegregation 'where it is not the spirit, but the bodies which count'." *United States v. Indianola Municipal Separate School Dist.*, 410 F.2d 626, 631 (5th Cir. 1969).
>
> "The transformation to a unitary system will not come to pass until the board has balanced the faculty of each school. . . ." *United States v. Greenwood Municipal School District*, 406 F.2d 1086, 1094 (5th Cir. 1969).
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> "If there are still all-Negro schools, or only a small fraction of Negroes enrolled in white schools, or no substantial integration of faculties and school activities, then, as a matter of law, the existing plan fails constitutional standards. . . . The board should consider . . . closing all-Negro schools, consolidating and pairing schools, rotating principals, and taking other measures. . . ." *Henry v. Clarksdale Municipal Separate School District*, 409 F.2d 682, 689-90 (5th Cir. 1969).

As a result of this "southern strategy", the imposition of racial quota and racial balance requirements has with but a few exceptions[11] become the pattern within the Fifth Circuit. *Singleton, et al. v. Jackson Municipal Separate School District, et al.*, 419 F.2d 1211 (5th Cir. 1969), ordered a mid-term reassignment of teachers so that as of February 1, 1970, the ratio of black to white teachers in each school would be the same as existed within the entire school system. It was further ordered that student bodies be merged "into unitary systems" by

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[11]In *Ellis v. The Board of Public Instruction of Orange County, Florida*, 423 F.2d 203, 208, 213-16 (5th Cir. 1970), a neighborhood school attendance system was upheld notwithstanding the existence of all-Negro schools in a predominantly white school system.

the Fall of 1970. A district court which held on January 21, 1970, that nothing in the Constitution required racial balance of pupils within the public schools was summarily reversed by the Fifth Circuit on February 5, 1970.[12] As a result of litigation instituted by the federal government directly against the State of Georgia and the State Board of Education, all *State school funds* were ordered to be withheld from some 81 local school systems within Georgia unless such school systems agreed to the implementation of judicially specified racial quotas. See *United States v. The State of Georgia, et al.*, Civil Action No. 12972, N.D. Ga. (Order filed Dec. 17, 1969).

The demoralizing disruption of the educational process in Georgia and in the other Southern States subjected to the discriminatory actions of these federal officials has long been obvious to all who can see and are willing to see. Massive transfers of teachers and pupils have been and are being required without the slightest regard for established teacher-pupil relationships, without the slightest regard for the location of schools and distances to be traveled, without the slightest regard for curricula needs and desires, and without the slightest regard for the individual pupil or teacher and his personal friendships and attachments. Is it at all surprising that about 40% of the State's county and municipal school superintendents have departed from their offices over the past two years? Does this loss of administrative experience somehow further equal educational opportunity?

Nor can the damage to public education in the South

[12] *Bivins, et al. v. Board of Public Education and Orphanage for Bibb County, et al.*, No. 1926 (M.D. Ga., Order filed Jan. 21, 1970), *rev'd. sub nom, Bivins v. Bibb County Board of Education*, 424 F.2d 97 (5th Cir. 1970).

be disregarded upon the highly questionable theory that it is only transitory wreckage during an "adjustment period". How does one calculate the loss of a single competent teacher who forever departs from his chosen profession rather than accept transfer from a school near his residence to a more distant facility? The number of experienced teachers who have departed from the school systems in which they had been teaching is already substantial. Evidence indicates that an even larger number will depart during the current school year. Other teachers, forced by economic circumstances to remain in the school system, become disheartened upon finding themselves not only in a new school, but forced to teach outside the area of their particular competency and choice. Overlooked in the shuffle to achieve racial balance of faculty in each school has been the detail that no correlation whatsoever is apt to exist between the system-wide racial composition of faculty and the black-white ratio for French teachers, science teachers, math teachers, remedial instruction teachers, etc.

Perhaps one of the most lasting of all injuries to public education, an injury which may indeed prove fatal to public education in some areas of Georgia, is the change of attitude of those who ultimately foot the bill for its continuance. Along with parents and pupils, the general public, regardless of race, has become quite disenchanted with a system of public education which takes funds which could be utilized for direct educational expenditures, as for books and teachers' salaries, and requires them instead to be expended to transport children to more distant schools in order to receive racially balanced instruction from a newly transferred teacher who very likely is teaching an unfamiliar subject and thoroughly

unhappy about her transfer in the first place. Nor does the general citizenry appreciate the social value of closing perfectly adequate (not to mention expensive) school facilities in one place in order to spend hundreds of thousands of dollars more for the construction of new facilities elsewhere just because someone thinks (usually erroneously) that more racial integration will result.[13] The dangerous decline of public support for public education renders the defeat of proposed school bond issues at the polls more likely and can cause intense opposition to any increase in taxation for public education. Another ominous aspect of public disenchantment with public education is seen in the sharp increase of actual withdrawal from the public schools. In Taliaferro County, Georgia, for example, the government's efforts resulted in each and every white teacher and each and every white pupil withdrawing from the public school system of that county in favor of either the newly created private schools within the county or public schools elsewhere. See *Turner v. Fouche,* 396 U.S. 346, 349 (1970). Preliminary Fall 1970 enrollment figures for the Atlanta public schools indicate that some 6,000 pupils have withdrawn from this school system, and similar figures for Bibb County (Macon), Georgia indicate that that system has lost 4,000 students. *The Atlanta Constitution,* Vol. 103, No. 67 (Wed., Sept. 2, 1970). Particularly ominous is the fact that it is generally the children of middle and up-

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[13]When, due to the government's racial balance pressures, the Fulton County (Georgia) school system closed the all-black Eva Thomas school in order to transfer its pupils to more distant predominantly white schools, a massive sit-in by black students developed. It ended when the Eva Thomas school was at least temporarily reopened with judicial approval. Then too, people often vote with their feet.

wards economic and social backgrounds who first depart. It is this segment of society which traditionally has been the pillar of local moral and financial support for public education.

Needless to say, the wreckage which thoughtless federal officials have inflicted upon public education in Georgia has caused incalculable injury to the State itself as well as to its citizenry. Hundreds of thousands if not millions of State supplied dollars have been lost through the pressured closing of adequate school facilities. The lessening of Georgia's ability to provide a sound program of public education for its youth, in addition to irreparable injury to those pupils who are unable to afford adequate private instruction, adversely affects the State's competitive position respecting the areas in favor of which federal officials discriminate. Other things being equal, industry will prefer to expand to those states which have not had their educational systems dismantled by the government.

Yet as destructive of public education as racial quotas and balance requirements are, as unsatisfactory as they have proven to be to reduce rather than increase racial polarization and animosity, we reluctantly could accept this punishment if it were to be inflicted equally upon all sections of the Nation—North as well as South. As of now this most demonstrably has not been the case. Nor will it ever become the case if this Court does not take action to end the existing disparity of treatment. The most recent statistics available from the United States Department of Health, Education and Welfare respecting the high but still increasing level of racial segregation in Northern school systems well illustrate that although the War Between the States ostensibly ended over 100

years ago, there continues to be one set of "guidelines" for the South and quite another for the rest of the Nation —one rule for the conquerer and one for the conquered. While we doubt that anyone disputes the national scope of racial separation in public education, we have set forth specific examples, taken from HEW's most recent statistics, in our appendix to this brief. We respectfully refer the Court to the same, thinking that it is worth looking at these few examples of the inordinately high levels of apartheid which have been achieved in Northern school systems without any noticeable interference by the same federal officials who have been so active in the derogation of *meaningful* public education in so many areas of Georgia and the other Southern states.

SUMMARY OF ARGUMENT

Brown v. Board of Education, 347 U.S. 483 (1954), held that a black child cannot be excluded from one school and required to attend another school solely because of his race. All too many governmental officials have misconstrued *Brown* to require that black and white children must be excluded from one school and required to attend another solely because of their race (i.e., to meet racial quota or balance goals).

The situation might be likened to the invalidating of laws requiring black citizens to sit in the rear of a bus. A great many governmental officials are in the position of insisting that the decision requires black and white passengers to be seated according to a percentage or quota system so as to enforce a uniform racial distribution throughout the bus. We object to the government's conversion of a personal right into a personal duty just as

we would object to its equating a citizen's right of religious freedom with a duty to go to church.

The evil is magnified when obeisance to a particular dogma is demanded only of those citizens of the United States who happen to reside in the South.

While we think that the nature of our argument causes attempts to summarize it almost inevitably to result in oversimplification, we would state its principal thrust as follows: Racial quota, percentage or balance requirements are among the most obvious of racial exclusions. An "at least" for one race is a "not more than" for the others. Quota and percentage requirements based upon race are necessarily "a guaranty of inequality of treatment of eligible 'persons' ", *Banks v. Housing Authority,* 120 Cal.2d 1, 260 P.2d 668, 673-74 (1953), and have been uniformly condemned by the courts. See, e.g. *Truax v. Raich,* 239 U.S. 33, 42-43 (1915); *Colon v. Tompkins Square Neighbors, Inc.,* 294 F.Supp. 134, 139. (S.D.N.Y. 1968).

In the field of public education, we read *Brown,* and more recently, *Alexander v. Holmes County Board of Education,* 396 U.S. 19, 20 (1969), as prohibiting State-imposed racial exclusions absolutely and without regard to their form. But whether or not we are correct in this view, and whether or not the latter case meant what it said and said what it meant when it defined the constitutional requisite as a school system:

> "within which no person is to be effectively excluded from any school because of race or color",

we think that constitutional analysis, in the light of many other of this Court's past decisions, impels the conclusion that racial quota, percentage or balance requirements are

as much at war with the Constitution as they are with human dignity and those basic moral foundations upon which we hope our Nation rests. To start with, we think that the federal government lacks any power whatsoever to establish racial quotas for children and teachers in the public schools. This sort of activity simply is not a means which can be said to be reasonably related to the furtherance of any legitimate governmental end or purpose. As we show in our argument, the activities in question actually negate rather than further the legitimate governmental goal (recognized in *Brown*) of equal educational opportunity. In some instances the racial exclusions coerced by federal officials actually serve to guarantee non-education for the poor.

Moreover, even were it to be assumed, *arguendo*, that racial exclusions in the form of quota and balance requirements did reasonably relate to furtherance of the legitimate governmental end of equal educational opportunity, such exclusions are nonetheless prohibited by the Constitution because they are an oversweep in remedy, see e.g. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965). They violate transcendental countervailing rights, privileges and immunities secured to parents, pupils and teachers by the First and Fifth Amendments. The rights in question have been well defined by this Court in such cases as *Board of Education v. Barnette*, 319 U.S. 624, 637, 640-41 (1942); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); and *Meyer v. Nebraska*, 262 U.S. 390, 399-403 (1923); as well as again more recently in *Epperson v. Arkansas*, 393 U.S. 97, 105-106 (1968).

We agree that State-compelled racial separation is

dead. We do not think, however, that the corpse should be replaced with a procrustean bed of uniform racial balance, which in many areas already threatens public education with loss of vitality if not of life. Other options are available. The ability of local school systems to innovate and experiment ought not to be foreclosed in favor of the same moribund uniformity of educational doctrine (this time it is racial balance) which this Court condemned in *Board of Education v. Barnette,* 319 U.S. 624, 640-41 (1942).

Finally, in the event the Court disagrees with our view that racial exclusions are prohibited by the Constitution regardless of their form or purpose, we urge it to terminate the invidious sectional discrimination which has until now permeated federal enforcement. Surely regional bigotry is as offensive as racial bigotry. How long is the "conquered province" approach to continue? The existing situation, aptly termed a "monumental hypocrisy" by Senator Ribicoff of Connecticut, is well documented by the government's own records, reports and statistical releases—to which we have referred in our fact statement. It is a national scandal for which judicial correction has long been overdue. There can be no such thing as true constitutional government in the United States if the laws of the land mean one thing in Georgia and another in Ohio. If children and teachers must be prodded about to achieve racial balance in Charlotte, North Carolina or Athens, Georgia, what moral or constitutional justification could possibly exist to ignore the situation in Cleveland, Chicago, and New York? This Court has not hesitated to strike far lesser discriminations in the past. E.g. *Yick Wo v. Hopkins,* 118 U.S. 356, 373 (1886); *Dobbins v. Los Angeles,* 195 U.S. 223, 240 (1904). We im-

plore the Court to point out once again that there is but one Constitution for *all* citizens and that children who happen to reside in Georgia also are entitled to its protection.

ARGUMENT

1. GOVERNMENTAL ATTEMPTS TO IMPOSE RACIAL EXCLUSIONS (i.e. QUOTA, PERCENTAGE, OR BALANCE REQUIREMENTS) UPON PUPILS AND TEACHERS IN GEORGIA'S PUBLIC SCHOOLS ARE UNAUTHORIZED BY THE CONSTITUTION AND LAWS OF THE UNITED STATES IN THE FIRST INSTANCE, BUT IN ANY EVENT ARE PROHIBITED IN THAT THEY VIOLATE TRANSCENDENTAL RIGHTS SECURED TO CHILDREN, PARENTS, TEACHERS AND THE STATE ITSELF UNDER SAID CONSTITUTION AND LAWS.

Persons concerned with human dignity have almost universally looked upon quota or percentage requirements based upon race with revulsion. The unsavory practice of some colleges of establishing quotas for the admission of certain religious minorities, the subject of heated debate in the '30s and '40s, is for the most part but an unpleasant memory today. More recently, the inherently arbitrary and discriminatory nature of ethnic and racial quotas has led to drastic revision of our National Immigration Laws so as to eliminate their consideration in determining who shall be admitted into the country. See, 79 Stat. 911, 8 U.S.C. §§ 1151 et seq; 1965 *U. S. Code and Admin. News,* pp. 3328-3354. Needless to say, it matters not whether the quota or

percentage is cast in terms of "at least" or "not more than". One quite necessarily includes the other.[14]

We think it obvious that the question of whether these roundly condemned racial quotas or percentages can be constitutionally imposed by governmental authority in the field of public education requires two related yet different inquiries. Inasmuch as the federal government and its officers are possessed of but limited powers under our federal system, the first inquiry must be whether under the Constitution and laws of the United States the federal government legally is empowered to take any action at all respecting racial quota or percentage exclusions in the public schools. Then, assuming that the federal government does have power to act in the matter, we must look to see whether there exist limitations upon its exercise by way of transcendental countervailing rights, privileges or immunities secured to parents, pupils and teachers under the Constitution and laws of the United States. In a somewhat analogous situation involving a compulsory salute to the flag,[15] this Court explained in *Board of Education v. Barnette*, 319 U.S. 624, 635 (1942):

> "It is not necessary to inquire whether nonconformists beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty."

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[14]An "at least" for one race is a "not more than" for the other. Hence a racial quota, percentage, number or balance requirement is one of the clearest possible forms of racial exclusion. It also is rather important to note that the race which is the majority varies from school district to school district.

[15]Here the federal government seeks to compel school assignments based wholly on race in order to achieve racial balance or quotas.

(a) *The government of the United States is without legal authority to impose racial exclusions by coercing school attendance in such manner as to achieve any particular balance, quota, number or percentage requirement for a given race in a given school.*

It must be emphasized that we do not attack the holding of *Brown* that State-enforced segregation according to race is violative of the Fourteenth Amendment. To the extent that it is a vindication of the present and unqualified constitutional right of a pupil to be neither excluded from nor forced to attend any particular school solely because of his race, we indeed insist upon *Brown*. It is exactly this right which the federal government denies. The situation may be likened to the invalidating of a law requiring a black citizen to sit in the rear of a bus. We do not in the least object to the substitution of a personal right and freedom (to sit anywhere) in place of his former duty and obligation (to sit in the rear). To the contrary, we insist upon this personal right and freedom. What we object to is the bus conductor seizing the body of any black citizen who happens to choose a seat in the rear and dragging him forward against his will to compel him to sit beside someone just because the someone is white. We strenuously object to this conversion of the black citizen's newly acquired constitutional right and freedom into a governmentally imposed duty.

In attempting to fathom the claimed legal basis (if any) for any governmental official's self-asserted power to deny individual freedom and liberty to both black and white pupils and teachers respecting school assignment (apparently upon a "democracy doesn't work" theory) and substitute in its place a duty on the part of individuals of both races to submit to such racial quota,

percentage, or number requirements as the federal official may from time to time deem appropriate, it would seem that the approach sanctioned by this Court is to define first the governmental purpose or objective to be served, which must itself be legitimate, and then, in light of this purpose or objective, to examine the means to see if they are appropriate and reasonably related to attainment of the goal. Particularly is this so where as here the selected means constitutes an obvious deprivation of individual liberty. In a similar setting of attempted governmental restraint upon parental rights and liberties respecting their children's education, *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923), this Court explained:

> "The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect."

In *Meyer*, the governmental purpose had been defined as the desire for unity and the development of a more homogeneous people who would be imbued with American ideals. To this end Nebraska adopted as its means a statute prohibiting the teaching of a foreign language to any child prior to his completion of the eighth grade [the thought being that this would provide a common cultural base by making English the mother tongue of all]. While the Court agreed that it might be highly advantageous if everyone had a ready understanding of our ordinary speech, it pointed out in no uncertain terms that even this presumably valid legislative end did not justify a means which resulted in the deprivation of personal freedom. It rejected the means chosen by *Nebraska*. At 262 U.S. 403, the Court said:

> "No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed. We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the State."

The *Meyer* principle of rejecting undue restrictions upon the liberty of teachers and pupils was quite recently reaffirmed in *Epperson v. Arkansas,* 393 U.S. 97, 105 (1968).

Looking first to what valid governmental purpose or objective racial quota requirements are supposed to serve, we obviously must start out by rejecting such cant as "necessity of dismantling the dual school system" and the acceptability of desegregation plans only if "they work". Such semantical shibboleths, aside from the fact that they obfuscate rather than clarify, utterly fail to answer "why" and hence, like the terms "desegregation" and "integration" themselves, are really concerned only with the "means". While they sometimes are, they really ought not to be confused with (much less equated with) the ultimate governmental purpose or objective to be served.

In defining just what the legitimate governmental goal is, it is perhaps best to return to the taproot of the entire question, *Brown v. Board of Education,* 347 U.S. 483 (1954). In speaking of the inherent *inequality of educational opportunity* when students are compelled by law to attend racially segregated schools, it appears to be quite clear that this Court viewed the primary vice of such legally-enforced apartheid to be the psychological effect upon the hearts and minds of black pupils. The Court said at 347 U.S. 494:

"To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.' Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson,* this finding is amply supported by modern authority."

The rationale of *Brown,* in other words, was that State-compelled segregation according to race engendered feelings of inferiority in the black student which precluded the possibility of "equal educational opportunity". It is, in other words, "equal educational opportunity" which is the right protected by the Fourteenth Amendment. It is the protection or furtherance of this right which is *ipso facto* the legitimate goal or purpose of the Federal government. Subsequent decisions of the Court have continued to demonstrate that in protecting this *personal* right it is the harmful effect of State *compulsion* (and not the consequences of individual freedom

of association) which is the proper object of governmental attack. In *Loving v. Virginia,* 388 U.S. 1, 10 (1967), it was said:

> "The clear and central purpose of the Fourteenth Amendment was to eliminate *all official state sources* of invidious racial discrimination in the States." (Italics added)

Similarly, in one of its most recent decisions concerning school desegregation, the Court again stated the matter in terms of State-enforced racial separation when in *Alexander v. Holmes County Board of Education,* 396 U.S. 19, 20 (1969), it referred to the termination of a dual school system and coming into being of a unitary system as the point where the system is one:

> "within which no person is to be effectively excluded from any school because of race or color."

We do not dispute the fact that racial quota, percentage and balance requirements constitute a means of eliminating this constitutionally impermissible barrier (State-compelled segregation) to the legitimate governmental goal of equal educational opportunity. But the test is not whether the means removes a barrier to the end. It is achievement of the end itself to which the means must be appropriate and reasonably related. A means which merely supplants the old impediment with a new one does not necessarily bring the goal closer. The precise question to be answered is whether the racial exclusions currently coerced by governmental officials (in the form of racial quota, percentage or balance requirements) are appropriate and reasonably related to the legitimate governmental goal of "equal educational opportunity".

In answering this question, it is perhaps appropriate

that we first pause to consider just what "equal educational opportunity" is. A simplistic answer, of course, is that each and every child, regardless of background and desires, regardless of whether he is mentally retarded or a child prodigy, must receive exactly the same education. Yet we doubt that anyone in this or any related case will argue in favor of this equality of input and devil take the hindmost approach to public education. More likely we will find a rather general agreement that the ultimate goal of public education is to make available to each child (a highly individual and complex being) that variety and degree of learning which he needs, desires, and is capable of absorbing. Looking at "equal educational opportunity" in the light of this goal (which we assume to be quite generally accepted), we see that uniformity of educational treatment is in fact the antithesis of "equal educational opportunity". One of the advantages of open enrollment, for example, is the very fact that schools can differ, that they can have varying curricula and standards which can be designed to meet the particular needs and desires of the children who choose to attend each particular school. Needless to say, this progressive approach to education is completely ruled out where the school assignments are made on a racial basis rather than upon the students' needs, desires and aptitudes.

For this reason among others we think that the correct answer to the question is that racial quota, percentage, number or balance requirements have no place in public education. As a means, they are inappropriate and not reasonably related to the legitimate governmental goal of equal educational opportunity. In too many instances, they instead absolutely preclude attainment of the goal. As we have previously shown, the factual result

of such racially motivated assignment, regardless of high-flown theory, in all too many school systems has been but a general deterioration of public education for all. Pupils and teachers who find themselves assigned to schools and excluded from others solely because of their race—in order to achieve what some governmental official at a given moment deems to be a suitable racial blend (seemingly in direct contradiction of what this Court said in *Alexander v. Holmes County, supra*), are not apt to be at their teaching and learning best. Their sense of frustration is increased when they are forced to teach and study outside of the areas of their needs, desires and aptitudes. It is increased further when they are required to get up earlier and arrive home later—in order to travel longer distances to the school they have no desire to attend in the first place. Too often the net result has been physical withdrawal from and consequential resegregation of the public schools, accompanied by diminished financial support generally. In referring to the utter failure of such racial quota or percentage requirements to achieve even the immediate and improper ambition of federal officials (i.e., varying degrees of racial balance), Professor Alexander M. Bickel states in "Desegregation, Where Do We Go From Here?":[16]

> "But whatever, and however legitimate, the reasons for imposing such requirements, the consequences have been perverse. Integration soon reaches a tipping point. If whites are sent to constitute a minority in a school that is largely black, or if blacks are sent to constitute something near half the population of a school that was formerly white or nearly all

[16]The New Republic, Feb. 7, 1970, pp. 20, 21. Professor Bickel, long having been associated with the vanguard of the civil rights movement, can scarcely be dismissed as a "racist".

> white, the whites flee, and the school becomes all or nearly all-black; resegregation sets in, blacks simply changing places with whites. They move, within a city or out of it into suburbs, so that under a system of zoning they are in white schools because the schools reflect residential segregation; or else they flee the public school system altogether, into private and parochial schools."

Professor Bickel asks:

> "What is the use of a process of racial integration in the schools that very often produces, in absolute numbers, more black and white children attending segregated schools than before the process was put into motion?"

There is no doubt as to the fact that in other civil rights arenas, the courts have looked upon racial quotas with something less than approval. In the context of racial quotas in public housing it was stated of such a requirement in *Taylor v. Leonard,* 30 N.J. Super. 116, 103 A.2d 632, 633 (1954):

> ". . . it is also a violation of section 1 of the Fourteenth Amendment of the Constitution of the United States.
>
> It is immaterial that the quota actually used bears some relation to the percentage of Negro population in the particular municipality.
>
> The evil of a quota system is that it assumes that Negroes are different from other citizens and should be treated differently. Stated another way, the alleged purpose of a quota system is to prevent Negroes from getting more than their share of the available housing units. However, this takes for granted that Negroes are only entitled to the enjoyment of civil rights on a quota basis."

Similarly (and more recently) in *Colon v. Tompkins*

Square Neighbors, Inc., 294 F.Supp. 134, 139 (S.D.N.Y. 1968), the district court declared:

> "The 'Tenant Selection Policy and Guidelines' submitted to this Court by defendant Tompkins Square is basically sound. However, the document, in its reference to the desirability of a 'balanced tenant body' vaguely smacks of a quota system which in the opinion of this Court, represents a constitutionally impermissible process requiring arbitrary rejection of applicants after a set quota has been met."

In striking such a racial quota or percentage system respecting public housing, it has been noted that quotas based upon race bear no relationship to individual eligibility and in reality constitute:

> ". . . an arbitrary method of exclusion, a guaranty of inequality of treatment of eligible 'persons' ",

and that:

> "[i]t is the individual, . . . who is entitled to the equal protection of the laws, — not merely a group of individuals or a body of persons according to their numbers." *Banks v. Housing Authority,* 120 Cal.App. 2d 1, 260 P.2d 668, 673-674 (1953).

Another trouble with quotas and the exclusions they necessarily entail was pointed out in *Truax v. Raich,* 239 U.S. 33, 42-43 (1915). In holding quotas respecting alien employment rights unconstitutional under the Fourteenth Amendment, this Court observed:

> "If the restriction to twenty per cent, now imposed is maintainable the State undoubtedly has the power if it sees fit to make the percentage less!"

The existence of racial quotas would presumably require constant quota readjustments as the racial composition of the body upon which the quotas are based changes, if

not for other reasons which might from time to time be deemed appropriate by those who govern. The best way to avoid the problem is obviously to avoid its beginnings. See *Board of Education v. Barnette,* 319 U.S. 624, 641 (1942).

Returning to the field of public education, we think the vices of racial quotas and their consequential racial exclusions are of no different import in the constitutional sense. We find it difficult to see any rational connection at all between the *Brown* theory of psychological injury to a black child through *State-imposed racial exclusion* and the situation where a black child attends a predominantly black or even all-black school because he *personally desires* to do so due to his preference for companionship with members of his own race, because he considers it to be the best school for his own personal educational needs and desires, or because it is the school closest to his home. In the latter situation, the dangers of psychological injury (and denial of equal educational opportunity) are manifestly much less than where he is required to attend a school he doesn't want to attend—once again simply because he is black.

Because the racial exclusions we have described are contrary to the Constitution, they are outside the executive, legislative and judicial powers of the United States. To the extent that any court order requires them, it is unconstitutional and a complete nullity. See e.g., *Erie Railroad Company v. Tompkins,* 304 U.S. 64, 78-80 (1938); *United States v. Walker,* 109 U.S. 258, 265-66 (1883); *Windsor v. McVeigh,* 93 U.S. 274 (1876); *Fay v. Noia,* 372 U.S. 391, 423 (1963).

(b) *Even if a rational connection could be said to exist between the legitimate governmental goal of prohibiting State-required racial separation and the imposition of racial quotas as one available means of achieving this legitimate end, such means is a remedial oversweep which violates transcendental countervailing rights, privileges, and immunities secured to parents, pupils, teachers and the State by the Constitution and laws of the United States.*

In *Shelton v. Tucker,* 364 U.S. 479, 488 (1960), it was said:

> "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose."

And in *Griswold v. Connecticut,* 381 U.S. 479, 485 (1965), the Court referred to:

> ". . . the familiar principle, so often applied by this Court, that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the areas of protected freedoms'."

Where, as here, it is a First Amendment right which federal officials seek to abridge (to wit: the right of association), even a rational connection between the means and the end will not by itself suffice. Here there must be a "compelling reason" to justify the government's interference with the protected right. E.g., *Board of Edu-*

cation v. Barnette, 319 U.S. 624, 639 (1942). As stated in *NAACP v. Alabama,* 357 U.S. 449, 460-61 (1958):

> "Of course it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."

This principle has long been recognized by this Court in the context of parental freedom respecting the education of their children. In *Pierce v. Society of Sisters,* 268 U.S. 510, 534-35 (1925), the Court struck a statute which required children to attend public as opposed to parochial or private schools, saying:

> "Under the doctrine of *Meyer v. Nebraska,* 262 U.S. 390, we think it entirely plain that the Act of 1922 unreasonably interfers with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

It cannot seriously be debated that the parental right to guide one's child intellectually, culturally and religiously, is a most substantial part of the liberty and freedom of the parent. The means currently favored by federal officials (i.e., racial quota, percentage, number or

balance requirements) to insure abrogation of those phychological barriers to "equal educational opportunity" caused by state-compelled racial separation, sweep far too broadly into this area of constitutionally protected freedoms. It may be true that some still believe that a racially balanced classroom is educationally beneficial and hence should be an end in itself. It is also factually quite obvious that many parents disagree. But be this as it may, it is settled that the First Amendment does not permit the imposition of any uniform educational dogma, process or set of beliefs upon each and every school district, school, parent, pupil and teacher in the land. As pointed out in *Board of Education v. Barnette*, 319 U.S. 624, 637 (1942):

> "Free public education, if faithful to the idea of secular instruction and political neutrality will not be partisan or enemy of any class, creed, party, or faction. If it is to impose any ideological discipline, however, each party or denomination must seek to control, or failing that, to weaken the influence of the educational system."

With particular relevance to the oversweep of present governmental efferts, it was also observed in *Barnette:*

> "National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement. Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate

methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority." 319 U.S. *at* 640-41.

The vitality of this principle was again pointed out in the recent case of *Epperson v. Arkansas,* 393 U.S. 97, 106 (1968), where after reiterating that the First Amendment did not tolerate laws that cast a pall of orthodoxy over the classroom, this Court said:

"There is and can be no doubt that the First Amendment does not permit the State to require that teach-

ing and learning must be tailored to the principles or prohibitions of any religious sect or dogma."

It is significant to note that the dogma of "racial balance" would among other things absolutely preclude fulfillment of the educational aspirations espoused by growing numbers of the leaders of the black community. As Professor Bickel tells us:

> "Polls asking abstract questions may show what they will about continued acceptance of the goal of integration, but the vanguard of black opinion, among intellectuals and political activists alike, is oriented more toward the achievement of group identity and some group autonomy than towards the use of public schools as assimilationist agencies. In part this trend of opinion is explained by the ineffectiveness, the sluggishness, the unresponsiveness, often the oppressiveness of large urban public school systems, and in part it bespeaks the feeling shared by so many whites that the schools should, after all, be an extension of the family, and that the family ought to have a sense of class and cultural identity with them. And so, while the courts and HEW are rezoning and pairing Southern schools in the effort to integrate them, Negro leaders in Northern cities are trying to decentralize them, accepting their racial character and attempting to bring them under community control. While the courts and HEW are reassigning faculties in Atlanta to reflect the racial composition of the schools and bring white teachers to black pupils and black teachers to white ones, Negro leaders in the North are asking for black principals and black teachers for black schools."[17]

While this sort of community control over public education may not be constitutionally required, it is hard to

[17]The New Republic, Feb. 7, 1970, pp. 20, 22.

see why the Constitution must make any accommodation of the black community's aspirations in the matter impossible. Presumably, it is the common goal of all to provide the best possible education for each and every child within our public school systems. Are there really no constitutionally permissible alternatives to the present juggling about of pupils and teachers (without any apparent regard for their highly individualized educational needs, goals and desires) simply to achieve a well-blended color scheme? Is this "equal educational opportunity"? Must all opportunity for innovation in public education be sacrificed with appropriate *te deums* to ever higher levels of racial balance? Must any plan for decentralization to achieve greater parental or community control be scuttled in favor of ever larger educational parks and complexes designed to bring about greater racial, economic and social homogenization—with the inevitable lessening of the power of parents and communities to shape the destinies of their own children? Are the fundamental rights of parenthood of which this Court so eloquently spoke in *Pierce v. Society of Sisters,* 268 U.S. 510, 534-35 (1925) and *Meyer v. Nebraska,* 262 U.S. 390, 399-400 (1923), to be discarded in obeisance to the notion that those who govern care more for children than those who gave them life? We think it a singular as well as tragic commentary on our times that these questions of basic human liberty need even be asked.

Under either the traditional neighborhood school form of organization or under an open enrollment plan, it would be possible, for example, to permit any remaining racially or ethnically concentrated schools to design educational programs adopted to the particular educational needs and goals of that group, and in a degree which very

likely would not be practicable in a racially and ethnically balanced school. If the black community desires its children's education be shaped in part to enhance black cultural identity, why is this any more unconstitutional than conducting elementary grades in Spanish in certain public schools of New York or Miami which have a preponderance of Spanish-American pupils, or than allowing German-speaking citizens of Nebraska to maintain their particular cultural heritage? See *Meyer v. Nebraska*, 262 U.S. 390 (1923). Diversity has made this country great. Stagnation would be the result of uniformity—not national unity. As Professor Bickel observes:

> "There are black schools all over the country. We don't really know what purpose would be served by trying to do away with them, and many blacks don't want them done away with. Energies and resources ought to go into their improvement and, where appropriate, replacement. Energies and resources ought to go into training teachers, and into all manner of experimental attempts to improve the quality of education. The involvement of cohesive communities of parents with the schools is obviously desired by many leaders of Negro opinion. It may bear educational fruit, and is arguably an inalienable right of parenthood anyway. . . ."[18]

That the Constitution and laws of the United States were never intended to permit the federal government and its officials to go as far as they have gone in disrupting public education and in destroying the constitutionally protected right of association is, or at least should be, obvious. We have already referred to the fact that any racial quota, percentage or balance requirement under

[18]The New Republic, "Desegregation, Where Do We Go From Here?", pp. 20, 22 (Feb. 7, 1970).

the guise of enforcing the Fourteenth Amendment is, constitutionally speaking, a conceptual monstrosity. It completely overlooks basic facts as to what the Fourteenth Amendment is all about. As we have already pointed out, it overlooks the fundamental fact that the Amendment was designed to afford personal rights to individuals and protect them against the arbitrary exercise of governmental power — not to expand governmental power at the expense of individual and personal rights. In *Brown v. Board of Education,* 347 U.S. 483 (1954), this Court declared that individual and personal rights protected by the Fourteenth Amendment included the right of an individual not to be excluded from or assigned to a public school solely on the basis of his race (with a correlative governmental duty not to deny or interfere with the individual's exercise of this right). The imposition of racial quota, percentage or number requirements by the federal government is a complete denial of the Fourteenth Amendment personal right enunciated by *Brown.* It is nothing less than the conversion of this personal constitutional right into a personal constitutional duty to attend a school to which one has been assigned solely and exclusively because of one's race (with a correlative governmental right to determine school exclusions and assignments on a racial basis, regardless of the pupil's desires and needs).[19]

It is undoubtedly this precise sort of perversion of the Constitution which Congress sought to guard against when it enacted the Civil Rights Act of 1964. While gov-

[19]See, *Perry,* "Racial Imbalance and the Fourteenth Amendment—Equal What?", 52 A.B.A. Journal 552 (1966) [Mr. Perry is of counsel for the State in the instant case]; *Bickel,* "The Supreme Court and the Idea of Progress", Harper & Row (Feb. 1970).

ernmental officials have paid litle heed to any of the restraints or limitations of this Act in their dealings with the school systems of Georgia and the other Southern States, it expressly provides in Title IV that:

> " 'Desegregation' means the assignment of students to public schools and within such schools *without regard* to their race, color, religion, or national origin, but *'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance.*" 42 U.S.C. § 2000c(b) (Italics added)

The complete ignoring by HEW of all of the italicized restraints in its dealings with Southern school districts is a matter of public record. Racial quota, percentage or number requirements manifestly require the assignment of students to public schools *with regard* to their race and needless to say are in direct violation of the legislative mandate.

In authorizing suits by the Attorney General on behalf of pupils being deprived "by a school board" of the equal protection of the laws, Title IV also provides:

> ". . . nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance. . . ." 42 U.S.C. § 2000c-6(a).

The ignoring of this restraint by recent occupants of the Office of Attorney General has been as open and flagrant as has been that of the various HEW Secretaries respecting 42 U.S.C. § 2000c(b). Too many federal officials still think of the rule of law as something with which only Southern school districts need concern them-

selves. The Act also has been totally ignored as to its limitation of Federal financial assistance terminations to situations of "actual exclusion" of an individual from participation in a federally assisted program due to race, color or national origin, or his being:

> ". . . *subjected to* discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. (Italics added)

Despite the fact that it is plainly impossible for anyone to be "subjected" to anything concerning which he has a choice, federal officials have continued to ignore this limitation, and have enforced racial balance, quota, number or percentage requirements (however labeled for word game purposes) regardless of the desires of the parents, pupils and teachers involved. These governmental officials, in other words, have not only violated and perverted the spirit and letter of the Constitution but have also directly ignored the Congressional mandate in the matter.[20] It is respectfully submitted that any imposition of racial exclusions (i.e., quota, percentage, number or balance requirements) upon teachers and pupils in the public schools of Georgia or any other state is as obnoxious to the Constitution and laws of the land as it is to human liberty and dignity.

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[20]The possibility of Congressional relief is unlikely. With the exception of a few courageous men such as Senator Ribicoff, it does not appear that many Northern congressmen are willing to don sackcloth and ashes over educational injury to Southern children only—particularly where they, politically speaking, retain the best of both worlds by perpetuation of the discrimination against the South (as a scapegoat) while avoiding similar disruption of the educational process in their own constituencies.

2. EVEN IF RACIAL EXCLUSIONS IN THE FORM OF QUOTA, PERCENTAGE OR BALANCE REQUIREMENTS COULD BE SAID TO BE CONSTITUTIONALLY PERMISSIBLE OR REQUIRED, EXISTING LOP-SIDED ENFORCEMENT AGAINST CHILDREN, PARENTS, TEACHERS AND SCHOOL DISTRICTS IN SOUTHERN STATES ONLY, CONSTITUTES INVIDIOUS SECTIONAL DISCRIMINATION WHICH IN AND OF ITSELF IS VIOLATIVE OF RIGHTS SECURED TO SUCH PERSONS UNDER THE VARIOUS "DUE PROCESS" AND "EQUAL PROTECTION" GUARANTEES OF THE UNITED STATES CONSTITUTION.

The disparity between the treatment accorded the South and that accorded the rest of the Nation in connection with the factual separation of black and white pupils in the public schools is a national scandal. Senator Ribicoff of Connecticut openly admits that the North is guilty of "monumental hypocrisy" in the matter and in an interview, Vice President Spiro Agnew expresses the hope the courts will act so that "the lack of evenhandedness in treating North and South would disappear". In a concurring opinion in *Northcross v. Board of Education of The Memphis, Tennessee City Schools,* 397 U.S. 232, 236-37 (1970), Mr. Chief Justice Burger states that the constitutionality of racial percentage requirements (which the Justice Department and HEW have been seeking to foist upon Southern children since 1966) should be resolved by the Supreme Court as soon as possible. Professor Alexander M. Bickel, a constitutional law authority of impeccable credentials among civil rights advocates, asks:

> "On a normative level, is it right to require a small rural and relatively poor segment of the national population to submit to a kind of schooling that is disagreeable to them (for whatever reasons, more or less unworthy), when we do not impose such schooling on people, in cities and in other regions, who also dislike it (for not dissimilar reasons, more or less equally worthy or unworthy)?"[21]

We indeed find it quite difficult to see how anyone can view the so well recognized invidious sectional discrimination respecting the imposition of racial quota, number, percentage or balance requirements with anything less than moral outrage. Past and present governmental activities have been at odds with the Biblical injunction of Matthew 7:3-5 and Luke 6:41-42 to say the least. It is of greater importance only with respect to this particular case and this Court's adjudication of the same that the government's actions are also violative of (a) Article IV, Sec. 2, Par. 1 of the Constitution of the United States,[22] (b) the "due process" clause of the Fifth Amendment thereto, and (c) the "equal protection" standards enunciated by the Fourteenth Amendment and rendered applicable to the federal government by the Fifth, Ninth and Tenth Amendments to the Constitution.

All of these provisions, of course, relate to those basic jurisprudential concepts of essential fairness embodied in "due process" and "equal protection". Factually speaking, controversies involving these concepts most frequently have arisen under the Fourteenth Amendment, which by its terms is applicable only to the States and

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[21]The New Republic, "Desegregation, Where Do We Go From Here?", pp. 20, 21 (Feb. 7, 1970).

[22]"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

does not bind Federal officials. It is now settled, however, that by virtue of other constitutional provisions these same standards are fully applicable to arbitrary actions and essential unfairness on the Federal level. In *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954), it was said that:

> "The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process."

This incorporation of the "equal protection" clause into the "due process" clause was continued in *Griswold v. Connecticut,* 381 U.S. 479, 487 (1965), where Chief Justice Warren, Justice Goldberg and Justice Brennan, in their concurring opinion, referred to *Bolling v. Sharpe, supra,* as having derived an "equal protection" principle from the Fifth Amendment's "due process" clause, and where the dissenting opinion of Justices Black and Stewart stated that the entire bill of rights, including the "due process" clause of the Fifth Amendment, was a guarantee that all persons would receive equal treatment under the law. Virtually all recently reported decisions in point appear to have adopted the view that the "equal protection" standards of the Fourteenth Amendment are also constitutionally guaranteed under the "due process" clause of the Fifth Amendment. See, e.g., *Harrell v. Tobriner,* 279 F.Supp. 22, 25 (D.D.C. 1967) [3 judge],

aff'd., 394 U.S. 618 (1969); *Brown v. McNamara*, 263 F.Supp. 686, 691 (D.N.J.), *aff'd.*, 387 F.2d 150 (3d Cir. 1967); *Todd v. Joint Apprenticeship Committee*, 223 F.Supp. 12, 19-20 (N.D.Ill. 1963). As stated by Judge Edgerton in his concurring opinion in *Fulwood v. Clemmer*, 111 U.S.App.D.C. 184, 295 F.2d 171, 174 (D.C. Cir. 1961):

> "Though the equal protection clause of the Constitution applies in terms only to the states, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."

In addition to the Fifth Amendment, we think that the right of the State of Georgia and the right of parents, pupils and teachers, to receive substantial equality of treatment respecting the application and enforcement of Federal law, is also protected by the Ninth Amendment, which declares:

> "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people,"

and by the Tenth Amendment, which provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

In *Griswold v. Connecticut*, 381 U.S. 479, 488-99 (1965), Justice Goldberg indicated that the framers of our Constitution inserted the Ninth and Tenth Amendments to make it abundantly clear that the enumeration in the first eight amendments of certain specified rights reserved to the people (and therefore not subject to encroachment by the new and somewhat feared Federal government) were never intended to be construed as ex-

haustive of the fundamental rights which the Constitution gurantees to the people. Those other fundamental rights, or, in other words, those rights of such nature as to cause their denial to be violative of those fundamental principles of liberty and justice which lie as the base of all of our civil and political institutions, are protected by the Ninth and Tenth Amendments. That the concept of "equal protection" before the law (with its corollary prohibition of irrational and capricious classifications) is one of those "fundamental principles of liberty and justice" upon which our government is based would seem to be self-evident. But if any doubt ever could have been said to have existed on the matter, it was resolved in *Harper v. Virginia Board of Elections,* 383 U.S. 663, 667 (1966), where the court stated:

> "This [the equal protection clause] is an essential part of the concept of a government of laws and not men. This is at the heart of Lincoln's vision of 'government of the people, by the people [and] for the people.' "

We do not overlook the fact that the Attorney General possesses broad authority to institute, control or dismiss legal proceedings brought on behalf of the United States. Nor are we unaware of the discretion of the Secretary of the United States Department of Health, Education and Welfare in his administration of those laws which Congress has placed in his hands. But it is axiomatic that neither the Attorney General, nor the Secretary of HEW, nor any other official of the United States, stands above the law. None, from the President on down, can lawfully act without regard to the constitutional and statutory limitations upon the exercise of the power of his office. See e.g., *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 585-89 (1952). As Mr. Justice

Holmes stated over 40 years ago:

> "The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power." *Myers v. United States,* 272 U.S. 52, 177 (1926) [dissenting opinion].

Thus the broad power of the Attorney General has constitutional limitations. One such limitation is that he cannot enforce the law in an arbitrary and discriminatory manner. We think a court would pay little heed to any contention that his "discretion" enabled him to enforce narcotics laws only against black citizens, or the antitrust laws only against Michigan, Indiana, Illinois or Ohio corporations. Invidious sectional discrimination in enforcement of uniform national civil rights statutes permits of no different rule. Even if existing governmental practices, conduct and actions were lawful (we believe we have already shown quite clearly that they are not), the present lop-sided enforcement of the law would be violative of well-settled constitutional guarantees. In *Yick Wo v. Hopkins,* 118 U.S. 356, 373 (1886), this Court, in reviewing a municipal ordinance enforced only against Chinese, declared:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Dobbins v. Los Angeles, 195 U.S. 223, 240 (1904), cited *Yick Wo* as authority for the proposition that al-

though a law might be lawful upon its face and apparently fair in its terms:

> ". . . if it was enforced in such a manner as to work a discrimination against a part of the community for no lawful reason, such exercise of power would be invalidated by the courts."

The continued vitality of this settled constitutional concept of nondiscriminatory enforcement of the laws being required by "due process" and "equal protection" is seen in such recent cases as *Dixon v. District of Columbia,* 129 U.S.App.D.C. 341, 394 F.2d 966, 968 (D.C. Cir. 1968), where the court of appeals observed that even the almost unlimited discretion of a prosecutor to drop or press charges could run afoul of the "equal protection" clause (as applied to the Federal Government by the "due process" clause of the Fifth Amendment), if the prosecutor employed an impermissible classification in deciding who would and who would not be prosecuted. *Cain v. Bowles,* 4 F.R.D. 504, 505 (D. Ore. 1945), explained in language applicable to either the Attorney General or the Secretary of HEW:

> "The Administrator's discretion, like all discretion involving the exercise of power is a legal discretion, and must be fairly exercised on a consideration of the whole record. No citation of authority is necessary for this fundamental proposition." 4 F.R.D. *at* 505-06.

Scores of this Court's decisions have reached this same conclusion. See, e.g., *Social Security Board v. Nierotko,* 327 U.S. 358, 369 (1945); *Dismuke v. United States,* 297 U.S. 167, 172 (1936); *Kwock Jan Fat v. White,* 253 U.S. 454, 457-58 (1920); *American School of Magnetic Healing v. McAnnulty,* 187 U.S. 94 (1902).

Frankly, we think the invidious sectional discrimination of which we complain is so well known as to be a matter of judicial notice. As already pointed out, it has been fully acknowledged by the Vice President of the United States as well as such civil rights stalwarts as Senator Ribicoff and Professor Bickel. We would hope that justice is not deaf as well as blind and that geographic bigotry will no longer be countenanced by the courts. The statistical information set forth both in this brief and in the appendix thereto is but illustrative of what is found in the government's own reports. These figures speak in a most stentorian manner. They crystalize that which everyone already knows, serving to point out the enormity of the present sectional discrimination, particularly in light of the high national level of factual racial separation within the public schools. While it would serve no valid purpose to review these startling statistics once again, it does bear repeating that even prior to the government's massive assault upon the children, teachers, parents and schools of Georgia and the other Southern States, the United States Commission on Civil Rights had concluded that the extent of racial separation, isolation or segregation in Northern school systems did not differ markedly from that in the South.[23] It also bears emphasis that outside the South such factual racial separation, isolation and segregation has been permitted to grow without any real hindrance or interference by federal officials, since the 1967 Report of the Civil Rights Commission, to the point where the government's most recent statistics show that in the Nation as a whole only 23.4 percent of all black pupils enrolled in the public schools were attending predominantly white schools,

[23]U. S. Commission on Civil Rights, "Racial Isolation in the Public Schools"; p. 7 (1967).

and that fully 61 percent of black public school pupils in the United States were attending schools which were virtually all (95 to 100 percent) black. As pointed out in the statement portion of our brief, the governmental releases show that federal officials have, insofar as enforcement is concerned, closed their eyes to the racial situation in public schools everywhere in the United States other than the South. It is this distortion of vision which we pray the Court to correct.

It is self-evident, we think, that there can be no such thing as true constitutional government in the United States if the laws of the land mean one thing in Georgia and another in Ohio. Nor can there be true constitutional government if federal officials charged with enforcing law apply it with an uneven hand, construing it to require one result in South Carolina and another in New York. If an all black school or a school lacking any specified number, percentage or quota of a given race, is unconstitutional or ineligible for federal financial assistance in Athens, Georgia, or Charlotte, North Carolina, the same result must obtain in Chicago, Cleveland, Philadelphia and everywhere else. We know that anything less is unacceptable morally. We would like to think anything less is unacceptable politically. We are of the opinion that anything less is unacceptable constitutionally.

CONCLUSION

Pre-*Brown* State-compelled racial separation is dead. We seek not to resurrect it. But is there but one lawful alternative or option available to supplant the corpse? Must public education be placed in a procrustean bed of racial balance which will surely sap its vitality if not its life? Is there any possible justification for the existing

attempt to enforce uniform racial balance on public school pupils or teachers? In *Barnette,* this Court spoke in favor of diversity and multiple options, and against governmentally imposed uniformity. It said:

> "Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure towards unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing." *Board of Education v. Barnette,* 319 U.S. 624, 640-41 (1942).

After pointing out that the resulting unanimity in such situations was that of the graveyard, this Court noted the First Amendment to the Constitution was designed to avoid this end by avoiding these beginnings. It is a shame that the striking and prophetic wisdom of the above words has been forgotten.

The government continues to seek higher and higher levels of racial balance in Southern schools, to use the words of *Barnette,* with "ever-increasing severity". We think there is little doubt but that the injury being inflicted upon the children, parents and teachers of Georgia and of the other states victimized by the government's actions renders that described by the Court in *Brown*

v. Board of Education pale by comparison. At issue is nothing less than permanent injury to the hearts and minds of hundreds of thousands if not millions of both black and white children who, lacking the financial means to escape to private schools, will, as the result of the government's actions, be relegated to declining public school systems increasingly bereft of public support, including the vital fiscal support which must be maintained and increased if public schools are to remain viable institutions capable of furnishing meaningful educational opportunity. There is the very real danger of a hardening of class lines, with the children who are forced to attend public schools being condemned to a second class education and consequently second class economic and social opportunity. This is not mere speculation or unfounded fear. As we have shown, the withdrawal process has already started.

The situation becomes even more completely intolerable, as well as divisive nationally, when it is realized that it is only those children, teachers and parents who happen to live in Georgia and the other Southern States who are forced to comply with racial quota and balance requirements. We hope that this Court will make it crystal clear that it meant what it said and said what it meant in *Alexander v. Holmes County Board of Education,* 396 U.S. 19, 20 (1969), about the constitutional mandate being that "no person . . . be effectively excluded from any school because of race or color". We think the decision of the Supreme Court of Georgia is plainly right. We think that decision should be affirmed.

In the event the Court does not agree with us as to the unconstitutionality of the federal government's coercion of racial exclusions (in the form of quota, percentage and

balance requirements), we urge the Court to declare that there is but one Constitution for all citizens and that the same standards applicable to Georgia must be applied throughout the United States.

Respectfully submitted,

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APPENDIX

RACIAL SEGREGATION IN SIX TYPICAL NORTHERN STATES AS SHOWN BY RECENT HEW STATISTICAL RELEASES

OHIO

1. *Cleveland*

The rising tide of racial segregation in the schools of Cleveland between the years 1952 and 1962 is detailed in the 1967 Report of the U. S. Commission on Civil Rights (See Brief, p. 8). By 1962, the city's conversion to a dual system of education based upon race was almost complete. Fully 84.4 percent of Cleveland's black pupils were in majority black schools, with over half of these black pupils (57.4 percent) attending schools which were almost entirely (90 to 100 percent) black. At the other end of the spectrum, 80.2 percent of Cleveland's white students were in almost entirely (90 to 100) percent white schools.

While this already high level of racial separation or segregation might have been thought difficult to increase, Cleveland has accomplished the task. According to HEW's most recent survey the percentage of the city's black pupils attending majority-black schools by the Fall of 1968 had risen from 84.4 percent to 95.2 percent, with the percentage attending almost entirely (90 to 100 percent) black schools being up from the 57.4 percent level to 86 percent. As of the Fall of 1968, 93 percent of Cleveland's white students, on the other hand, were still attending predominantly white schools, with 74.6 percent being enrolled in schools almost entirely (90 to 100 percent) white (the slight drop in this last mentioned figure presumably being attributable to the

overall increase of black pupils to roughly 56 percent of Cleveland's total enrollment). Of the city's 180 schools, 23 are 100 percent black and 78 have more than 80 percent black enrollment. There are 9 *all* white schools and 44 schools having higher than 80 percent white enrollment. Indeed, only 7 of the city's 180 schools approach what might be considered to be racial balance (i.e., a fifty to sixty percent black enrollment).

It would appear that problems of racial imbalance as to teaching staff have been largely avoided in Cleveland by the simple expedient of not employing any great number of black teachers. In sharp contrast to the roughly 56 percent black pupil enrollment only 28.9 percent of the teaching staff is black. (In a similar situation, the Atlanta, Georgia, public school system employs a teaching staff composed of 57 percent black teachers). HEW's figures show that black teachers are by and large assigned to black schools, while instruction in white schools is mostly by white teachers (Atlanta is under court order to effect racial balance in each of its schools based upon the system-wide black-white teacher ratio). Neither the Justice Department nor HEW appears to have shown any interest in disestablishing the dual school system of Cleveland, Ohio.

2. *Hamilton*

Racial segregation in the public schools of Ohio is not in the least confined to large urban areas as Cleveland or districts having a predominantly black enrollment. In Hamilton, Ohio, black pupils constitute only 10 percent of the school district's 15,463 students. One might well think that the mere 1,554 black students could be assigned so as to avoid any racial concentration. Such

is not the case. According to HEW's latest statistics, almost half of the district's black pupils (i.e., 673) have been placed in the Harrison school, which as a result of the racial concentration is 82.5 percent black. All but 4 of the district's 23 schools have black enrollments of less than 5 percent. Respecting faculty, only 17 of the district's teachers (less than 3 percent) are black. Nine of the 17 teachers have been assigned to the racially segregated Harrison school.

3. *Toledo*

According to the recent HEW survey, Toledo operated 76 schools during the Fall of 1968 and had an overall black enrollment of about 27 percent. Over half of the city's black students have been assigned to schools having black enrollments in excess of 90 percent and fully 77.3 percent of the black pupils are in predominantly black schools. The survey shows that the school district's black teachers are largely assigned to the segregated black schools.

4. *Columbus*

The survey indicated that Columbus, Ohio, operated 168 schools and had an overall black enrollment of about 26 percent. Forty percent of these students are in 90 to 100 percent black enrollment schools while fully 71.2 percent are in majority black enrollment schools. HEW figures show a pattern of faculty assignment according to race.

5. *Dayton*

Dayton too operates an almost completely segregated school system for its black pupils (who constitute 38.3

percent of Dayton's total public school enrollment). A startling 80.3 percent of Dayton's black pupils are assigned to 90 to 100 percent black enrollment schools while 82.2 percent of its white pupils are permitted to attend 90 to 100 percent white enrollment schools. Again HEW figures show that black teachers are assigned mostly to black schools. Of Dayton's 69 public schools, 20 are more than 90 percent black while 38 are more than 90 percent white.

Summing up the situation in Ohio, it would appear that whenever a school district in that State has a sufficient number of black pupils to make their concentration in a "black" school feasible, this is what is done. Racially segregated school districts covered by the recent HEW survey include Canton, Youngstown, Cincinnati, Springfield, Shaker Heights and Akron. HEW's "Directory, Public Elementary and Secondary Schools in Large School Districts (with enrollment and instructional staff by race, Fall 1967)" shows the same pattern in many more Ohio school districts. Until the '40s and '50s various Ohio cities openly maintained separate schools for black students in which instruction was ordinarily provided by an also segregated teaching staff.[1] Originally erected upon laws requiring or permitting it, racial segregation in the public schools of Ohio has been perpetuated and increased in the post *Brown* period to an extent which can scarcely be said to be unnoticed. Yet for all of the talk about the necessity of dismantling dual school systems, federal officials continue to look the other way when in Ohio. They continue to look only to the South.

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[1]See, U. S. Commission on Civil Rights, *Racial Isolation in the Public Schools*, p. 43.

ILLINOIS

1. *Chicago*

We have previously noted the growth of racial segregation in the public schools of Chicago to where by the 1965-66 school year fully 89.2 percent of the city's black pupils were enrolled in almost entirely (90 to 100 percent) black schools, while at the same time 88.8 percent of the city's white pupils were attending virtually all (90 to 100 percent) white schools. While HEW's latest figures show that this level of almost complete apartheid has tapered off ever so slightly, racial segregation continues to pervade the Chicago schools. The newest figures show that 86.1 percent of Chicago's black pupils (who constitute 52.9 percent of the total enrollment) continue to attend schools virtually all (90 to 100 percent) black (a drop of 3.1 percent since the 1965-66 school year). Significantly, the bulk of these students (i.e., 52.1 percent) attend schools which have a black enrollment in excess of 99 percent. Of the city's 610 schools, 42 are all black and 277 more than 80 percent black. Fourteen are all white and 207 are more than 80 percent white. Of the 610 schools, only 22 approach racial balance (which in view of the roughly fifty-fifty racial composition might be considered to be in the 45 to 55 percent black enrollment range). HEW's most recent survey shows the same general pattern of black teachers being assigned mostly to the city's segregated black schools.

2. *Harvey Public School District*

According to HEW's recent survey, the Harvey Public School District, as of the Fall of 1968, operated 8 schools with a total enrollment of 3,573 pupils of whom 879 (24.6 percent) were black. As in the case of Hamilton,

Ohio, one would think that such a system could easily dismantle its dual school system. As in the case of Hamilton, Ohio, it has not. It has assigned approximately half (i.e., 427) of its black pupils to the *all* black Riley school for a *totally* segregated education. An additional 286 black students are assigned to the 55 percent black Emerson school, 135 to the 26.3 percent black Lowell-Longfellow school, with the remaining 31 black pupils scattered as tokens among the 5 white schools so that none of the latter has a black enrollment in excess of 5.3 percent. Again, it is seen that black teachers are for the most part assigned to the segregated black schools. The Harvey Public School District has placed 15 of its 45 black teachers in the all-black Riley school. Thirteen are in Emerson, 5 in Lowell-Longfellow and the remaining 12 scattered in the white schools.

3. *Peoria*

The HEW survey shows similar racial concentration in Peoria, Illinois. Black enrollment is 17.7 percent of the total number of pupils in the city's 39 schools. Yet over half of these black pupils have been assigned to 7 schools which range from 50.3 to 95.7 percent black. Fully 19 schools are permitted to operate as almost entirely (90 to 100 percent) white schools. The survey once again shows a pattern of avoiding faculty desegregation problems by not employing any significant number of black teachers (only 4.7 percent in Peoria), and assigning those black teachers who are employed primarily to the black schools.

4. *East St. Louis*

East St. Louis reflects the same pattern of racial segregation, only this time in a predominantly black school

district (71.6 percent of the total enrollment is black). Fully 71.9 percent of the white students are permitted to attend predominantly white schools (with 4 schools being all white). Fully 24 of the district's 41 schools have a black enrollment in excess of 95 percent. As a result of the racial concentration, 76 percent of all black pupils attend virtually all (90 to 100 percent) black schools.

Summing up the situation in Illinois, it is seen that things are about the same here as they are in Ohio. Where there is a substantial number of black pupils, they are concentrated in predominantly black schools. In addition to the school districts which we have discussed, the recent HEW survey shows racially segregated school systems in Chicago Heights, Posen-Robbins, Waukegan, Springfield, Joliet and Rockford as well as other areas. HEW's "Directory, Public Elementary and Secondary Education in Large School Districts (with enrollment and instructional staff by race, Fall 1967)" shows the same pattern of racial segregation throughout the State. As in Ohio, racial segregation was frequently erected with official sanction in Illinois. As recently as 1952, at least seven counties of the State officially maintained separate schools for black pupils and openly assigned teachers and principals on a racial basis. See, U. S. Commission on Civil Rights, *Racial Isolation in the Public Schools*, p. 43. Federal officials have taken no steps to dismantle the dual school systems so prevalent in Illinois.

PENNSYLVANIA

1. *Philadelphia*

The 1967 Report of the United States Commission on Civil Rights reflected the increase of racial segregation in the public schools of Philadelphia between 1950

and 1965. It indicated that by 1965, 90.2 percent of the city's black students were in predominantly black schools with fully 72 percent being enrolled in virtually all (90 to 100 percent) black schools.

HEW's more recent survey shows that while the number of black pupils in virtually all (90 to 100 percent) black schools had decreased by about 3 percent (i.e., to 67.1 percent), over ninety percent remained in predominantly black schools. At the same time, the bulk (82.4 percent) of white students were still attending majority-white schools with over half (58.8 percent) being enrolled in virtually all (90 to 100 percent) white schools. In a system where black pupils constitute 58.8 percent of the total enrollment, 66 of the 278 schools had a black enrollment of over 99 percent while 35 schools had less than a 3 percent black enrollment. The familiar pattern of black teachers being more heavily concentrated in the black schools is also indicated by the recent survey.

2. *Pittsburgh*

Pittsburgh too operates a dual system of education for black and white pupils. While the black enrollment in Pittsburgh is but 39.2 percent of the total number of pupils in the city's schools, fully 78.6 percent are assigned to majority-black schools and over half (52.5 percent) are assigned to virtually all (90 to 100 percent) black schools. With respect to Pittsburgh's white students, 91.2 percent attend majority-white schools and almost half (47.6 percent) are assigned to virtually all (90 to 100 percent) white schools. Of the city's 113 schools only 4 approach racial balance (which based upon the system-wide racial composition might be said to be between 35 and 45 percent black enrollment). Again, black

teachers, if and when employed at all, are apt to be assigned to black schools.

3. *Penn Hills Township*

Penn Hills Township has approximately 14,128 pupils in its 16 schools. Only 5.7 percent (809) are black. Again, one would suppose that in such a system racial concentration could be avoided with little difficulty. Again, the government's own statistics show that anyone having such a thought would be in error. Almost a third of the black pupils (246) have been assigned to the 100 percent black Lincoln Park Elementary School. The remainder of black pupils are scattered among the 15 white schools—all of which have a white enrollment of more than 90 percent. Only 5 of the district's 581 teachers are black.

4. *McKeesport Area School District*

According to the HEW survey, this school district had an enrollment of 10,560 during the Fall of 1968, of which 1,336 (12.7 percent) were black. Over half of these black pupils were assigned to two schools, one being 83.5 percent black and the other 38.0 percent black. The remaining black pupils were scattered among fifteen of the remaining 21 schools of the district (6 schools being 100 percent white). Five of the seven black teachers employed by the school district were assigned to the predominantly black school.

The summing up of the situation in Pennsylvania leads one to the same conclusions which were made respecting Ohio and Illinois. The HEW survey of the Fall of 1968 showed a pattern of racial discrimination in such cities as Harrisburg, Chester City, Norristown, Wilkinsburg and Darby Township as well as in the districts we have dis-

cussed. HEW's "Directory, Public Elementary and Secondary Education in Large School Districts (with enrollment and instructional staff by race, Fall 1967)" clearly shows the same statewide pattern of racial segregation—provided an adequate number of black pupils exists within a school district so as to make segregation feasible—as is seen in Ohio and Illinois. Although black pupils constitute but 11.7 percent of Pennsylvania's public school students, fully 77.5 percent of the black pupils are concentrated in majority black schools. This figure is all the more significant when it is considered that Pennsylvania has a vast number of school districts where the black pupils are too small in number to practically permit racial isolation in any particular school. Again, it may be wondered why federal officials are so timid in school districts located outside the South.

NEW YORK

1. *New York City*

The New York City Public Schools had over a million students during the Fall of 1968, of which 334,841 (31.5 percent) were black and 467,365 (43.9 percent) were white (the HEW survey giving the separate breakdown for the substantial Spanish-American minority). The survey indicated that 80.3 percent of New York's black pupils were enrolled in schools which were predominantly "minority" schools and that over half of the black pupils attended schools which were virtually all (90 to 100 percent) minority. At the same time, fully 70.1 percent of the white students were attending predominantly white schools.

2. *Buffalo*

Buffalo operates 101 schools for its 72,115 students.

According to the HEW survey, black enrollment constituted 36.6 percent of the total in the Fall of 1968. As of that time, fully 62.5 percent of the city's black students were assigned to virtually all (90 to 100 percent) black schools. Of the white students, 98.4 percent attended predominantly white schools and 31.8 percent attended virtually all (90 to 100 percent) white schools. Twenty-three of the district's 101 schools were at least 90 percent black, while fifty-three were at least 80 percent white. HEW's statistics again reflect a pattern of black teachers (10.4 percent of the total) being concentrated in the district's black schools.

3. *Newburgh*

The same pattern of racial separation, isolation and segregation is seen in Newburgh. While black pupils constitute only 23 percent of the total enrollment, over half (57.4 percent) are in majority-black enrollment schools, with 33.2 percent in virtually all (90 to 100 percent) black schools.

Although the degree of racial segregation does appear to be slightly lower in New York than in Ohio, Illinois and Pennsylvania, it is by no means absent or insignificant. In addition to the systems mentioned, the HEW survey reflected varying degrees of racial segregation in the schools of Albany, Lackawanna, Niagara Falls, Niagara-Wheatfield, Utica and Monticello. On a statewide basis, black pupils constitute only 14.1 percent of the enrollment, yet 67.7 percent of New York's black pupils find themselves in predominantly black schools while fully 35.8 percent are in schools over 95 percent black.

CALIFORNIA

1. *Los Angeles*

According to the HEW survey, the public schools of Los Angeles, as of the Fall of 1968, had a "white" enrollment of 53.7 percent, a black enrollment of 22.6 percent, and a Spanish-American enrollment of 20 percent. The survey shows a remarkably high level of racial segregation. Fully 95 percent of the city's black pupils were attending schools which were over half minority enrollment while 83 percent were attending virtually all (90 to 100 percent) minority enrollment schools. At the same time, 92.3 percent of the city's white pupils were attending predominantly white schools and over half of the white students [53.6 percent were assigned to virtually all (90 to 100 percent)] white schools. Once again the HEW survey reflects the fact that black teachers are concentrated in minority schools.

2. *San Diego*

San Diego similarly reflects high level of racial segregation in its 155 schools. Black students, who constitute only 11.6 percent of the total enrollment, are segregated to such an extent that over half (54.6 percent) are in almost entirely (90 to 100 percent) minority schools while 74.8 percent are in predominantly minority schools. At the same time, the HEW survey shows that over half (54.8 percent) of the white students are in 90 to 100 percent white schools with 97 percent of the white students being in majority-white schools. The recent HEW survey once again reflects the pattern of black teachers being assigned primarily to black schools.

3. *Sequoia Union High School District*

The HEW survey shows that Sequoia Union High

School District operates 7 high schools with a total enrollment of 12,343 students of whom 1,351 (10.9 percent) are black. The majority of these black students (64.4 percent) have been assigned to a particular school (Ravenswood High) which is over 90 percent black. The remainder are scattered in the six white schools. As a result, 99.3 percent of all white pupils are in majority-white schools and 63.9 percent of the white pupils are in schools virtually all (90 to 100 percent) white. The system employs 580 teachers of whom 17 (2.9 percent) are black. Eight of the seventeen black teachers are assigned to the black school (i.e., Ravenswood).

4. *Fresno*

Fresno has 58,234 pupils of whom 5,251 (9 percent) are black. Eighty-four percent of the black pupils are in predominantly minority schools and 76.6 percent are in virtually all (90 to 100 percent) minority schools. Ninety-three percent of the white pupils are in predominantly white schools with 39.8 percent of such white pupils being in virtually all (90 to 100 percent) white schools.

5. *Compton City Elementary*

The HEW survey shows that this district has 16,407 pupils of whom 71.5 percent (11,725) are black. Of its 20 schools, 3 are 100 percent black and 12 are in excess of 90 percent black. The bulk of the white pupils in the system have been permitted to escape to 3 predominantly white schools. As a result, while 95.9 percent of black pupils are in majority-black schools, with fully 90.3 percent in virtually all (90 to 100 percent) minority schools, 77.7 percent of the white pupils attend predominantly white schools.

6. *Monrovia Unified School District*

This system has 7,118 students in its 10 schools, of whom 911 (12.8 percent) are black. Three hundred and thirty-four (36.6 percent) of the black pupils have been assigned to the all-black Huntington Elementary School, the rest being scattered among the 9 other schools. As a result, all white children attend majority-white schools with approximately 30 percent of the white pupils attending schools having in excess of a 90 percent white enrollment. The district employs 277 teachers of whom 14 (5.1 percent) are black. Five of the 14 black teachers are assigned to the all-black Huntington Elementary School.

Of the California school districts covered by the HEW survey, it did appear that one school district at least approached what might be considered to be an integrated system. The Berkeley Unified School District had 16,204 students during the Fall of 1968, with 6,917 (42.7 percent) being black students. Of its 33 schools, only one special school was 100 percent black and only two were more than 85 percent white. The remaining 30 schools ranged from 21.7 to a 64.1 percent black enrollment. In general, however, the HEW survey established that racial segregation in the public schools of California was as pronounced as it had been found to be in Ohio, Illinois and Pennsylvania.

NEW JERSEY

1. *Newark*

The HEW survey indicates that as of the Fall of 1968 Newark had 75,960 pupils of whom 54,757 (72.5 percent) were black. Ninety-eight percent of these black

pupils are in majority black schools with 86 percent attending virtually all (90 to 100 percent) black schools. A majority of the white pupils (59.1 percent) are permitted to escape to the district's 10 predominantly white schools.

2. *Atlantic City*

In the Fall of 1968, Atlantic City had 8,605 students in its 14 public schools. Black pupils, accounting for 62.3 percent of the total, were assigned largely to the 8 black schools so that over half of the district's black pupils were attending almost all (90 to 100 percent) black schools. At the same time, 84.8 percent of the white pupils were being permitted to attend the 5 predominantly white schools. Five of the 14 schools were 100 percent black and three other around the 70 percent level respecting black enrollment. The HEW survey once again reflected the pattern of concentrating the district's black teachers in its black schools.

3. *Camden City*

Camden is another example of a majority black enrollment district (58.9 percent) in which the bulk of the white minority (81 percent) is permitted to attend predominantly white schools. As a result, almost 60 percent of the black pupils attend virtually all (90 to 100 percent) black schools.

4. *Jersey City*

The HEW survey indicated that Jersey City operated 36 schools in the Fall of 1968 for 37,083 students. Forty-three percent of the total were black pupils, yet almost half (49.9 percent) of these black students were assigned to almost all (90 to 100 percent) black schools

with 81.1 percent being assigned to majority-black schools. Once again, the survey reflected a concentration of black teachers (12.8 percent of the total faculty of the district) in the black schools.

5. *Township of Union*

According to the HEW survey, Union had 8,719 students in the 10 schools it operated during the Fall of 1968. Of this total, 986 (11.3 percent) were black. Three hundred and seventy of these black students (37.5 percent) were assigned to the 94.9 percent black Jefferson school. One other school, Burnet Junior High, was 18.8 percent black (221 black students) while each of the remaining 8 schools was over 90 percent white. As a result, 99.7 percent of the white pupils attended predominantly white schools, with 87.2 percent attending virtually all (90 to 100 percent) white schools. Of the district's 412 teachers, 16 (3.9 percent) were black. Ten of these 16 black teachers were assigned to Jefferson and Burnet.

Summing up the public schools of New Jersey, we see the same picture of pervasive racial segregation as is reflected by the HEW survey for Northern school systems generally. While the percentage of black public school pupils in New Jersey constitute only 14.9 percent of the total, the HEW survey shows that 66.1 percent of these black pupils are in predominantly black schools, with an amazing 32.8 percent being enrolled in schools which are over 95 percent black.

We have examined a few of the dual school systems of Ohio, Illinois, Pennsylvania, New York, California and New Jersey. The school districts mentioned are neither the most nor the least racially segregated districts of the

Northern and Western States. Taking HEW's own recent survey, we could add hundreds of pages going into the high level of racial segregation in such cities as Detroit (Michigan), Baltimore (Maryland), Milwaukee (Wisconsin), St. Louis (Missouri), Kansas City (Missouri), Seattle (Washington), Portland (Oregon), Las Vegas (Nevada), Albuquerque (New Mexico), Omaha (Nebraska), Flint (Michigan), and Gary (Indiana) to mention but a few. The point is that the federal government's own survey shows a very high degree of nation-wide racial separation (with 61 percent of all black pupils in virtually all black schools and only 23.4 percent in predominantly white schools), and it is eminently reasonable to complain when the federal government's educationally disruptive and destructive attack upon this pervasive racial separation throughout the Nation is limited to one geographic region of the Nation as a scapegoat.